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No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Chemical Construction Corporation ("Chemico"),[1] respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the Second Circuit dismissing this case on grounds of res judicata.

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1/ Statement pursuant to Rule 28.1 of this Court: Chemico is a wholly-owned subsidiary of Aerojet-General Corporation, which, in turn, is a wholly-owned subsidiary of The General Tire and Rubber Company.

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OPINIONS AND JUDGMENTS BELOW

In addition to the opinions below which are cited at p. 1 of the Petition for Certiorari, the decision and judgment in Kremer v. State Division of Human Rights, 402 N.Y.S.2d 699 (1st Dep't), also bears upon this case.

STATUTES INVOLVED

In addition to the statutes set forth at page 2 of the Petition for Certiorari, the following additional statute is involved here:

28 U.S.C. § 1738:

> The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such State. . . .

STATEMENT OF THE CASE

A. The Proceedings Below

On June 2, 1980, the Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court for the Southern District of New York denying an attempt by petitioner Rubin Kremer ("Kremer") to relitigate in the federal courts, under Title VII of the Civil Rights Act of 1964,[2/] the identical claim of employment discrimination that he had previously asserted unsuccessfully against Chemico in the New York State courts. Both the Second Circuit and the District Court found Kremer's claim to be barred by res judicata upon the authority of Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979) ("Sinicropi"), a decision in turn based upon the earlier ruling of the Court of Appeals in a case dealing with the applicability of res judicata to a claim of discrimination under 42 U.S.C. § 1981, Mitchell v. National Broadcasting Company, 553 F.2d 265 (2d Cir. 1977) ("Mitchell"). The court also rejected Kremer's argument that Sinicropi, which was decided while this case was pending before the District Court, should be applied only "prospectively", so as to preclude application of its ruling to defeat his claim. Kremer's petition for rehearing and his suggestion for rehearing en banc, in which he urged that Sinicropi be overruled, were denied on October 15, 1980.

2/ 42 U.S.C. § 2000e, et seq.

B. Petitioner's Employment

Kremer was employed as an engineer by Chemico, a once-sizable international engineering and construction firm, from 1973 until August 1, 1975. During a period of slackening business he and a number of other employees of Chemico were discharged. When Chemico later rehired certain of these employees, Kremer was not rehired because those few new positions were filled by other former employees with greater seniority and because of his prior inadequate job performance.

C. The Claim Before the EEOC

This action found its way to the Court of Appeals along a now familiar path. On May 6, 1976, Kremer lodged a "Charge of Discrimination" against Chemico with the Equal Employment Opportunity Commission ("EEOC"), claiming that Chemico had discriminated against him because of his Jewish faith and his national origin.[3/] As required by the "deferral" provisions of Title VII,[4/] the EEOC referred Kremer's charge to New York's State Division of Human Rights (the "Division").

3/ Title VII (42 U.S.C. § 2000e-2(a)) prohibits discrimination in employment upon the grounds alleged by Kremer.

4/ The "deferral" provisions of Title VII require that the EEOC must defer action on an employment discrimination claim for a period of 60 days, in order to allow the pertinent State administrative and conciliatory system an opportunity to review, adjudicate and/or conciliate the dispute. If the State agency has not acted within 60 days, or if the complainant is not satisfied with the State administrative decision, he may then request that the EEOC process his claim. 42 U.S.C. § 2000e-5(c).

D. The Proceedings Before the Division

On May 20, 1976 Kremer filed a complaint with the Division alleging that Chemico had discriminated against him because of his Jewish faith, as well as his age.

The Division is a State administrative agency vested with plenary adjudicatory powers to eliminate specified discriminatory practices in employment.[5/] Upon the filing of a complaint, the Division is required to conduct a prompt investigation to determine if there is probable cause to believe that the alleged discrimination occurred.[6/] In the course of such an investigation, a pro se claimant may request the Division to issue subpoenas compelling the attendance of witnesses and the production of documents.[7/] Kremer never requested the Division to do so. If the Division finds "probable cause" to believe that the claimant's allegations have merit or are not frivolous, it must hold a public hearing on the discrimination charges.[8/]

5/ N.Y. Exec. L. § 295 (McKinney 1972 and Supp. 1976); Gaynor v. Rockefeller, 15 N.Y.2d 120, 132-133, 204 N.E.2d 627 (1965).

6/ N.Y. Exec. L. § 297(2).

7/ The Division's regulations provide for the issuance of subpoenas and subpoenas duces tecum "at the instance of any party who appears without attorney. . . ." Such subpoenas may be issued "at any stage of any investigation or proceeding pending before the Division. . . ." Rules of Practice and Procedure of the Division of Human Rights, 9 N.Y.C.R.R. 465.10 (1975); see Mitchell, supra, 553 F.2d at 271 n. 7.

8/ N.Y. Exec. L. § 294(4).

If, after the hearing, the Division finds that the employer has engaged in discriminatory conduct, the Division has full power to enforce the law. It can issue cease and desist orders, order that the employee be reinstated, and require the employer to pay back wages and damages.[9/]

If, however, the Division finds no probable cause to believe that the alleged discrimination occurred, it has authority to dismiss the complaint.[10/]

The Division conducted a multi-stage investigation of Kremer's allegations that afforded him full opportunity to state his case. On August 24, 1976 (by which time the 60-day "deferral" period had expired and Kremer, therefore, enjoyed the right to return to the EEOC and the District Court to press his charges,)[11/] Kremer met with a Division Field Representative, who reviewed with him all of the documents Chemico had submitted to the Division in response to his claim.

9/ N.Y. Exec. L. § 297(4).

10/ N.Y. Exec. L. § 297(2).

11/ The 60-day "deferral" period during which Kremer was required to seek State administrative relief expired on July 19, 1976.

On November 9, 1976 Kremer met with another official of the Division and stated his case to her. Finally, in March 1977, Kremer met with and stated his case once again to the Division's Regional Director.

On April 28, 1977 the Division issued its Determination and Order After Investigation (the "Determination and Order"), finding that there was "no probable cause to believe that [Chemico] engaged in or was engaged in the unlawful discriminatory practice complained of". The Division, therefore, dismissed the complaint.

E. The Proceedings Before the Appeal Board

On May 10, 1977 Kremer appealed the Division's Determination and Order to the State Human Rights Appeal Board (the "Appeal Board"), pursuant to the provisions of N.Y. Exec. L. § 297-a. In addition to arguing in his appeal that Chemico had discriminated against him, Kremer also raised and argued his claim that the Division had not given him an adequate and a procedurally fair hearing.

The Appeal Board is an adjudicatory authority within New York's Executive Department and is independent of

the Division.[12/] Its decisions are final and binding upon the Division, except as they may be modified by New York's appellate courts.[13/]

On September 16, 1977 Kremer, after having submitted his arguments in writing, appeared before the Appeal Board and orally argued his case. On November 25, 1977, after reviewing the record, the Appeal Board affirmed the Determination and Order of the Division.

12/ The scope of the Appeal Board's review is limited to determining whether the order of the Division is:

a. in conformity with the constitution and the laws of the state and the United States;

b. within the division's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the division;

d. supported by substantial evidence on the whole record, or

e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

N.Y. Exec. L. § 297-a(7).

13/ Id.

F. The Proceedings Before the Appellate Division

Petitioner then embarked upon a course of action which, for res judicata purposes, was of crucial, and controlling, significance. He decided to step outside the EEOC and State administrative framework of Title VII to which his claim had been "deferred", by appealing the order of the Appeal Board, on December 6, 1977, to a court, the Appellate Division of the New York Supreme Court[14/] (the "Appellate Division"). His appeal was lodged pursuant to both Section 298 of the Human Rights Law[15/] and New York

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14/ Mr. Kremer filed his appeal with the Appellate Division eight months after the Second Circuit's decision in Mitchell (see p. 1 , supra), and more than sixteen months after the expiration of the Title VII "deferral" period.

15/ The scope of review of the Appeal Board's order by the Appellate Division under § 298 of the Human Rights Law (N.Y. Exec. L. § 298) is as follows:

> The findings of fact on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole.

C.P.L.R. Article 78.[16/]

Under Section 298 of the Human Rights Law (N.Y. Exec. L. § 298), the Appellate Division has authority to enforce, modify or set aside the order appealed from. It may also remit a case to the Division for further proceedings if it finds that the investigation was procedurally inadequate and that specified evidence should have been adduced, but was not.

16/ The scope of review under C.P.L.R. § 7803 is as follows:

> The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

On this appeal, Kremer argued that Chemico had in fact discriminated against him as alleged and that the orders of the Appeal Board and the Division should be reversed. He also raised and argued his claim that the procedures before the Division had not given him an adequate and procedurally fair hearing and that specified evidence was not adduced.

The issues were briefed before the Appellate Division by both parties, and the full certified record of the administrative proceedings before the Division and the Appeal Board was submitted to the Appellate Division by the Division's General Counsel.[17/] On February 27, 1978, after receipt of all of the parties' submissions and of the certified record of the proceedings below, the Court unanimously ordered that "the determination of the respondent, the State Human Rights Appeal Board be, and the same hereby is, confirmed. . . ." [18/]

Kremer did not seek to appeal the order of the Appellate Division to the New York Court of Appeals, although he had that right.[19/]

17/ Mr. Kremer's unsubstantiated assertion (Petition for Certiorari, p. 13), that the certified record of the Division's proceedings was not before the court is simply not supported by the record.

18/ Kremer v. State Division of Human Rights, 402 N.Y.S.2d 699 (1st Dep't 1978).

19/ N.Y. Exec. L. § 298.

Under New York law, the order of the Appellate Division confirming dismissal of Kremer's claim has the status of a judgment, to which New York's courts give full res judicata effect.[20/]

G. Final Proceedings Before the EEOC

On December 4, 1977 Kremer returned to the EEOC for a final determination of his claim.[21/] On May 11, 1978 the EEOC denied his claim, finding that "there is not reasonable cause to believe that the charge is true". Dissatisfied with the EEOC's determination, he requested reconsideration in a letter dated June 15, 1978. By a letter dated June 27, 1978, the EEOC denied his request.

Kremer then commenced this Title VII action in the District Court. His complaint consisted of a one-page cover sheet to which was annexed virtually the entire record of the State administrative and judicial proceedings, and he has never disputed, that for res judicata purposes, his "cause of action" in the State proceedings was identical to that later asserted in the District Court.

20/ Reilly v. Reid, 58 A.D.2d 926, 397 N.Y.S.2d 429, 430, aff'd., 45 N.Y.2d 24, 379 N.E.2d 172 (1978).

21/ Again, Kremer had been free to return to the EEOC and press his claim before it and the District Court (regardless of the Division's actions) at any time after July 19, 1976 and long before the Division rendered its decision. This he did not do.

SUMMARY OF ARGUMENT

The writ should be denied for four reasons:

1. Contrary to petitioner's assertion, there is no conflict between the decision of the Second Circuit here and those of other Courts of Appeal.

2. 28 U.S.C. § 1738 requires federal courts to give full faith and credit to the judgments of State courts; the provisions of Title VII and its legislative history evidence no intention to override this statute or to repeal it by implication.

3. To the extent that the courts have found a requirement for de novo hearings of Title VII claims by the District Courts, they have done so only to prevent the District Courts from according preclusive effect to findings made in non-adversarial EEOC proceedings or in private arbitration proceedings; a judgment of a State court, on the other hand, is entitled to be accorded full res judicata effect.

4. For reasons fully addressed by the Court of Appeals, petitioner's "retroactivity" argument misconstrues the clear rule enunciated by this Court.

ARGUMENT

A. Introductory Remarks

Petitioner argues that granting of certiorari would be warranted because (1) the decision of the Court of Appeals in this case, and that in Sinicropi, upon which it relied, are in conflict with decisions of the Third and Eighth Circuits; and (2) the refusal of the Second Circuit to carve out a special Title VII exception to res judicata ignores what petitioner asserts to be a strong congressional policy requiring de novo hearings in the District Courts of all Title VII claims. Neither argument has any merit. In a subsidiary argument, confined to a single footnote, petitioner also urges that the Court of Appeals erred in declining to refuse to limit the "retrospective" effect of its decision in Sinicropi.

The three-judge panel of the Court of Appeals which heard Kremer's appeal properly declined his invitation to overrule an earlier panel's decision in Sinicropi and, therefore, did not discuss in its opinion the merits of the Sinicropi holding. For that reason and because Mr. Kremer challenges Sinicropi here, we discuss the rationale of that decision. The Court of Appeals, however, devoted a careful and lengthy discussion to Mr. Kremer's "retroactivity" argument, and, having nothing to add to that analysis, we respectfully refer this Court to that discussion of this point. See, 623 F.2d at 788-91.

B. There Is No Conflict with Decisions in Other Circuits

Urging that the writ be granted, Kremer asserts that the Second Circuit's decision here "conflicts with the decisions of two other circuit courts, and at least eight district court decisions". Petition for Certiorari, p. 7.

First, no asserted "conflict" between a decision of a Court of Appeals and decisions of District Courts, whether in the same or other circuits, provides a reason for granting the writ of certiorari.

Second, the "conflict" between the decisions of the Second Circuit here and in Sinicropi and those of other circuits does not in fact exist. Petitioner cites two such supposedly "conflicting" decisions: Smouse v. General Electric Co., 626 F.2d 333 (3rd Cir. 1980), and Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, ____U.S.____, 100 S.Ct. 2942 (1980). Both of these asserted "conflicts" are illusory.

In each of these other Title VII cases, it was the employer, rather than the employee, that brought an appeal from a State's administrative agency to that State's appellate courts. While both courts "disagreed" with

Sinicropi, both also expressly distinguished it upon this very ground.[22/]

This distinction is critical for res judicata purposes, as well as for safeguarding the integrity of Title VII. The deferral provisions of Title VII require an employee to pursue available state administrative remedies for 60 days before proceeding under Title VII before the EEOC or in the District Courts. It would indeed be anomalous and unfair to permit an employer to obtain a reversal in a State court of a state administrative finding of discrimination and then to assert that State court judgment as res judicata to deny the employee his Title VII remedies in federal court.[23/]

22/ See, Gunther, 612 F.2d at 1084 ("Mitchell and Sinicropi . . . are distinguishable and not controlling in our case . . .") and Smouse, 626 F.2d at 336 ("Here defendants sought state judicial review and, consequently, Sinicropi is distinguishable on that ground.")

In Smouse, the state proceeding involved a claim of discrimination brought by employees other than the plaintiff which the state administrative agency treated as a class action. Although deciding the case on other grounds, the Third Circuit noted that "it is unclear from the record how . . . the class action was certified by the [state agency] in this case or what type notice the plaintiff received" or "whether the procedures employed were adequate to bind the plaintiff by the class determination in the state proceedings".

23/ See, Gunther, supra, 612 F.2d at 1084, quoting Mitchell, supra, 555 F.2d at 275 n. 13, with approval.

The deferral provisions of Title VII, however, neither require an employee to pursue available state judicial remedies nor even to press his claim before state administrative authorities for longer than 60 days. This distinction is important and was recognized as such by both the Third and Eighth Circuits.

C. 28 U.S.C. § 1738 Is Fully Applicable Here

Petitioner states that "Res Judicata is a flexible, equitable doctrine". Petition for Certiorari, p. 15. No doubt it is. As such, it is difficult to conclude either that the equities are violated when an employee is denied the opportunity to relitigate in a federal forum a claim which he voluntarily and unsuccessfully brought before a State court or that an employer, burdened with defending that claim in the State court, should be denied the benefits - repose and freedom from defending claims already found to be meritless - that the rule of res judicata is designed to confer. Montana v. United States, 440 U.S. 147, 153 (1979).

For a federal court, however, faced with a plaintiff's attempt to relitigate a claim upon which he has lost in a prior State judicial proceeding, res judicata is no "mere" "flexible, equitable doctrine". This Court considered this question earlier this Term in the context of

a civil rights action under 42 U.S.C. § 1983:

> [T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:
>
> > The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . .
>
> 28 U.S.C. § 1738 (1976). (Emphasis added.)

Allen v. McCurry, ____U.S.____, 101 S.Ct. 411, 415-16 (1980) (footnote omitted; emphasis added).

In his single reference to 28 U.S.C. § 1738, Petition for Certiorari, p. 10, n.*, petitioner argues that Title VII "overrides the more general statutory requirement" of this long-standing provision. Such an implied repeal of 28 U.S.C. § 1738, Kremer maintains, is to be found in the supposedly overweaning congressional policy requiring de novo determinations of Title VII claims. Nowhere, however, does the language of Title VII either require this result or even hint at the existence of such a policy or any intent to override the express mandate of

28 U.S.C. § 1738. The Court dealt with an analogous claim in Allen v. McCurry, supra, and rejected it:

> [T]he legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States . . . and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights. . . . But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored, Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

____U.S.____, 101 S.Ct. at 417 (emphasis added; citations omitted).

The same conclusion follows in the case of Title VII, enacted by a Congress having far greater reason to concern itself with rules of preclusion than did the post-bellum Congress that enacted § 1983, yet giving no indication at all of any intent to override § 1738.

Unable to point to any express provisions of Title VII or any portions of its legislative history requiring de novo determinations in federal courts, petitioner cites three decisions of this Court as mandating that policy, chief among those Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).[24/]

That decision does not deal at all with the central issue here, whether a State court judgment is res judicata of a later federal action. Rather, the Court limited its inquiry, and the scope of its holding, in the opening paragraph of its opinion:

> This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII. . . . Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

415 U.S. at 38 (emphasis added).

24/ Kremer also relies upon Chandler v. Roudebush, 425 U.S. 840 (1976) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Both of these decisions are concerned with the effect of a prior administrative proceeding upon a later Title VII action and are, therefore, inapposite.

The Court did not deal with either the Full Faith and Credit provision of 28 U.S.C. § 1738, which is inapplicable to an arbitral decision, or with the question whether any policy of Title VII favors a de novo hearing with such force as to overcome the mandate of 28 U.S.C. § 1738. Rather, the Court held only that the policies of Title VII were strong enough to outweigh the "federal policy favoring arbitration of labor disputes. . . ." 415 U.S. at 45-46, and 46 n. 6.25/

25/ The Court also recognized the substantial disparity between the contractually-circumscribed arbitration remedy and the policy of Title VII favoring a full hearing of the discrimination claim:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement . . . in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws . . . . Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (citation omitted).

In addition, the Court based its decision on the ground that it would be manifestly unfair to hold that an employee could "waive" his Title VII rights via a collective bargaining agreement, where such a decision would be made by union-management negotiations, not by a personal, knowing decision. 415 U.S. at 51.

D. The Actual Scope of the Requirement Under Title VII for a de novo Hearing

Respondent does not deny that there is a right to a de novo hearing of a Title VII claim under certain circumstances, although no section of Title VII specifically requires a de novo hearing in a federal court. See, 42 U.S.C. § 2000e-5. There is also no grant of exclusive jurisdiction to the federal courts over Title VII actions.[26/] The de novo requirement is a judicially-created gloss on Title VII, based upon the statute itself, its legislative history and the holdings of the federal courts which have construed it.

This Court in Allen v. McCurry, supra, and the Second Circuit in Mitchell, supra, upon which the latter based its decision in Sinicropi, supra, have found no "civil rights" exception to the normal applicability of res judicata in actions under 42 U.S.C. §§ 1983 and 1981, respectively.[27/] Petitioner attempts to distinguish Mitchell, supra, by arguing that because in Title VII Congress "created a complex and carefully thought out structure for the resolution of employment discrimination claims. . . [t]he essential framework of the statutes - Section 1981 and

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26/ See, Bennun v. Board of Governors of Rutgers, 413 F.Supp. 1274 (D. N.J. 1976).

27/ In an earlier decision, the Court of Appeals exhaustively examined the cases carving out a "civil rights" exception to res judicata and found that exception to be a narrow one indeed. Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978).

Title VII - are simply different". Petition for Certiorari, p. 10. The "complexity" of Title VII, however, and the limited right to a de novo hearing both stem from the relationship between the federal courts and the EEOC.

Of primary concern to Congress were the weight and effect an EEOC determination would have in a subsequent Title VII federal court action. Chandler, supra, 425 U.S. at 843-58. The congressional purpose underlying the policy favoring a de novo hearing was the desire to ensure that the District Court would not merely review the decision of the EEOC, but would ascertain the facts itself.[28/]

This congressional policy favoring a de novo hearing was thus intended to free the District Courts to make independent factual findings at variance from any made by the EEOC, not to grant federal courts license to review the judgments of State courts unfettered by the requirements of 28 U.S.C. § 1738.

None of the decisions cited by petitioner in support of his position that Title VII always requires a de novo federal court hearing, Chandler, supra, McDonnell Douglas, supra, and Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978),[29/] supports

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28/ See, Interpretative Memorandum submitted by Senators Clark and Case, the floor-managers of the proposed legislation, 110 CONG. REC. 7213-14 (1964).

29/ Except for Gardner-Denver, which is discussed at pages 18 and 19 of this Brief.

that position. All these decisions, rather, deal with Congress's concern over the weight to be given an EEOC determination in a subsequent Title VII federal court proceeding. Those cases hold that the District Court cannot merely review the EEOC's determination in an appellate capacity, but is required to ascertain the facts itself. It scarcely need be noted that such a holding is not a holding that a prior State court judgment is not res judicata.

The courts have based their holdings that Title VII requires a judicial de novo hearing, rather than a mere review of the EEOC determination, largely on the statutory relationship between the EEOC and the federal courts. The nature of the EEOC proceedings is non-adversarial. The EEOC, moreover, has no authority to enforce the anti-discrimination provisions of Title VII, either by issuing cease and desist orders, requiring payment of back pay or requiring reinstatement. See, 42 U.S.C. § 2000e-5. All of these powers are vested exclusively in the federal court. That fact has led the courts to hold the federal District Court, not the EEOC, responsible for holding the de novo hearing. Chandler, supra, 425 U.S. at 848, n. 8, et seq.

The Ninth Circuit, in Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974), has specifically noted that those decisions upholding a right to a de novo hearing were "made

in light of the nonadversary nature of many EEOC proceedings". 505 F.2d at 1160, citing McDonnell Douglas, supra. As this Court said in Gardner-Denver:

> . . . Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. . . . Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated. . . . Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

415 U.S. at 44-45; accord, Chandler, supra, 425 U.S. at 852-53.

The considerations which have led the courts to require that the District Court (as opposed to the EEOC) conduct a de novo hearing do not apply in this case.

The New York Division has plenary powers to conduct full evidenciary hearings, and to enforce the law with remedial orders. In addition, the Appellate Division is empowered to enforce any order of the Appeal Board. Thus, the state administrative and judicial machinery has "plenary powers" to hold adequate hearings and to secure

compliance with the anti-discrimination laws. C.f., Gardner-Denver, supra, 415 U.S. at 45.

Gardner-Denver, Chandler and Bowers, then, read together, teach that the de novo requirement flows from the nature of the EEOC, and that when a claim is heard by an appropriate forum, with appropriate powers, prior to being brought to the federal court, the decision of the prior forum will be given such effect as the nature of that forum warrants. A decision of a State court warrants res judicata effect.

There is, therefore, no policy reason for petitioner to have a second hearing before a federal court.

E. That the New York Court Confirmed Dismissal under a "Restrictive" Standard of Review Does Not Strip Its Judgment of Res Judicata Effect

Lastly, petitioner argues that because the New York appellate court did not conduct a de novo inquiry into his claim but rather reviewed the determination below under a "restrictive" standard, its judgment confirming dismissal should not be accorded res judicata effect. Here he ignores three points.

First: The standard of review of any appellate court, State or federal, is necessarily different from that applied by the trier of fact; the restrictive standard of appellate review, however, does not deprive appellate judgments of res judicata effect.

Second: The standard of review applied by the State court here was that of N.Y. Exec. L. §298,[30] a standard in all material respects identical to that under § 706 of the Federal Administrative Procedure Act.[31] It cannot seriously be suggested that a decision of a federal court reviewing an administrative determination is subject to collateral attack.[32] Yet that result would follow from Kremer's analysis.

Third: Under New York law, the decision of the court in an Article 78 proceeding such as that brought by Kremer terminates in a "judgment . . . determining the rights of the parties".[33]

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court . . ..

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 339 (1945) (emphasis added).

30/ See p. 7 of this Brief.

31/ 5 U.S.C. § 706.

32/ When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of a reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become res judicata.

In re Federal Water & Gas Corp., 188 F.2d 100, 104 (3rd Cir.), cert. denied, 341 U.S. 953 (1951); accord, FTC v. Rubberoid Co., 343 U.S. 470, 476 (1952); Springfield Television Corp. v. F.C.C., 609 F.2d 1014, 1019 (1st Cir. 1979); Herman v. Gillilland, 218 F.2d 852, 853 (D.C. Cir. 1955).

33/ N.Y. C.P.L.R. § 411.

CONCLUSION

Petitioner Kremer has advanced no reasons sufficient to warrant granting of the writ of certiorari, and, accordingly, his petition should be denied.

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Respectfully submitted,

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